THE CHECK AND BALANCE SYSTEM AND ITS REVERSION

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The reactionary movement which developed into the French Revolution presents from among the flood of literature of the day setting forth both the economic and political evils of the old régime, a theory of government which, because of its acceptance in the United States and later in France, and also in the South American Republics, has become a fixed element in the political thinking of our day. The desire to limit the sovereign was the distinguishing feature of the pamphlets and letters of Frenchmen of the period touching upon the condition of their country. With most convincing argument Montesquieu in 1748 presented his view that the security that undivided sovereignty should not become a despotism lay in the performance of the executive, legislative, and judicial functions by special bodies. His observation of the British people led him to conclude that their enjoyment of political liberty was due to the particular merits of their constitution, by which the king's ministers, the legislature, and the law courts performed functions with a greater degree of independence than was the case in any other nation. He did not hope, however, to have this ideal type of government established in France, but rather to have a restoration of "privileges which though discontinued were not lost to memory," and of "those opposed and conflicting interests which interpose a salutary check on all precipitate resolutions, so organized as to limit arbitrary power of the government."

Montesquieu died in 1755, but his theory of government survived in the minds of men more radical than he, who, after the lapse of forty years from the time of its statement, encouraged to some extent no doubt by the acceptance of the doctrine by Blackstone in England as the principle underlying the British government and its application in the American state and federal constitutions, applied it with uncritical faith in the French constitution of 1791.

A more minute analogy between Montesquieu's theory and

the British government was drawn by Blackstone in his *Commentaries* published in 1765. It was this work on English law which has served as the foundation for much of our legal training even in the present day, that presented to the framers of the state constitutions and later of the United States Constitution, the system of checks and balances as applied in actual government of the time. The great jurist's recognition of the principle in the British government is clearly apparent when he refers to the Crown, the Lords, and Commons, and says:

> Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself would have gone, but at the same time in a direction partaking of each and formed out of all; a direction which constitutes the true line of liberty and happiness of the country.

But neither Blackstone nor Montesquieu maintained that a complete separation of powers was possible. There would be of necessity some processes of osmosis between them—a water-tight compartment for each branch of the government was not contemplated.

It was in the government of the American colonies, however, that a stricter application of the system than was possible in the home government presented itself. The presence of effective checks and balances in a government in which the executive and judicial departments were creatures of the home government, while the legislature was of local origin, is strikingly apparent. When the friction created by this maladjustment of governmental function developed into an open conflict and independence was declared, the states in many cases found themselves with only one of the three departments remaining, namely, the legislature. But a gradual evolution of executive and judicial departments was to follow. At first a weak and carefully circumscribed executive and judiciary existed as a result of newly framed constitutions and legislative enactments. Governmental machinery similar to the customary British pattern was eventually established in every state except Rhode Island and Connecticut. The check and balance theory of government dominated the thought of the framers of these new state constitutions as it did later the framers of the federal constitution. The difficulty encountered in providing for the two branches of government hitherto appointed by the Crown, gave rise to variety

both in the method of choosing the officials and in the extent of their power. The period was an experimental one in the establishment of governments. The political idea that was uppermost was that of Montesquieu. Quite naturally the locally organized legislative branch of the colonial government which survived, was granted supremacy. Fear lest they should reëstablish a condition that would lead to executive encroachment as they had experienced it, undoubtedly drove the framers to neutralize that department even with its new local origin to an unwarranted degree. The Articles of Confederation reflect the operation of the same precaution against the establishment of monarchical power in the massing in a Congress alone of the few powers the states were willing to concede. The incompetency of government provided in these Articles, as well as that of the state, eventually brought both financial and commercial distress sufficiently pressing to necessitate distinct provision for well defined executive and judicial powers. How these were to be incorporated with the assurance that they would function with sufficient vigor to assure stability of government, and yet with not so much vigor as to endanger the activity of the legislative branch, was a problem of no small importance when the Federal Convention assembled in 1787 to revise the Articles of Confederation.

The creation of a strong executive and judicial department was accepted as a necessary requirement. State rivalry and the common fear of a strong federal government among the state legislatures prevented the establishment of a system of government that could in any respect become aggressive. The results of the work of the convention show the most deliberate application of the theory of checks and balances yet produced. The creation of a strong executive and judicial department was accepted as a necessary requirment of the new government soon after the delegates entered upon their task. That they should exist and still not become the oppressive agents they had proven to be in colonial government, taxed their ingenuity.

As a result of the application of Montesquieu's theory to these conditions, the constitution presented a form of government in which the legislature was divided into two branches, that they might serve as checks on each other, and strong executive and judicial departments endowed with the powers of appointment,

veto, and annulment, that they might not only preserve themselves but also limit the power of the legislature as well. The selection of the lower branch of Congress was given to the people, while the upper was to be chosen by the state legislatures; an arrangement whereby the will of the people and the will of the states would be expressed in legislation acceptable to both. An indirect method of choosing the chief executive was provided, that neither the state nor the people would have undue advantage in controlling this all-important and hitherto dangerous official. The appointment of the judiciary by the President, with the advice and consent of the Senate, represents still further the ingenuity of the framers in their effort to prevent a continuous line of influence finding expression in the several departments. The legislature which had hitherto enjoyed great freedom of activity was now not only restricted by the executive and judiciary departments, but also by limitation on the character of its legislation.

It is of interest to note the jealousy with which each department has guarded itself against the encroachments of the other from time to time during the history of our present constitution. In 1796, during Washington's administration, the House of Representatives called on the President for instructions given to the United States Minister preliminary to Jay's Treaty, which had been already ratified, "except such as any existing negotiations may render improper to be disclosed." On the 30th of March of the same year Washington, in a message to the House, responded in part as follows:

> As it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard for the Constitution and to the duty of my office, under all circumstances of this case, forbids a compliance with your request.

When the Senate called upon President Jackson on December 11, 1833, to communicate to the Senate "a copy of the paper which had been published" over his signature, and which bore directly on the subject of the removal of deposits from the United States bank, he replied in his message of refusal that the executive was "a coördinate and independent branch of the government equally with the Senate." He continued with the following declaration:

> Knowing the Constitutional rights of the Senate, I shall be the last man under any circumstances to interfere with them. Knowing those of the Executive, I

shall at all times endeavor to maintain them agreeably to the provisions of the Constitution and to the solemn oath I have taken to support and defend it.

After refusing on several occasions to concede to the Senate the right to make requests of this kind, he expressed himself in a message of February 10, 1835, in regard to a request of an earlier date, in the following manner:

This is another of those calls for information made upon me by the Senate which have, in my judgment, either related to the subjects exclusively belonging to the Executive Department or otherwise encroached on the Constitutional power of the Executive. Without conceding the right of the Senate to make either of these requests, I have yet, for the various reasons heretofore assigned in my several replies, deemed it expedient to comply with several of them. It is now, however, my solemn conviction that I ought no longer, from any motive nor in any degree to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.

President Tyler, in answer to a request by the House addressed to the President and heads of the several departments, said to comply would not be "consistent with the rights and duties of the Executive Department," and further:

It becomes me, in defence of the Constitution and laws of the United States, to protect the Executive Department from all encroachments on its powers, rights, and duties.

Presidents Polk and Fillmore refused to comply with similar requests. President Cleveland, in his message of March 1, 1886, in referring to the numerous demands of the Senate upon the different departments of the government for information and documents, said:

My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of this great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.

The judiciary has asserted its independence and maintained it to an even greater degree. Washington in his first administration asked the Supreme Court for advice concerning the rights and duties of the United States under certain treaties and international law. The court refused to grant his request, and asserted that it would only render an opinion on the point involved when a case was brought before it. More than a century of precedents now sustains this

position of our courts. President Jefferson's refusal to appear before the Supreme Court at the request of Chief Justice Marshall seems to have left no doubts as to the inability of the courts to control the executive. The legislative department has found itself hedged in from the beginning by the express denial to it of certain powers by the Constitution, the veto of the President, and the nullification of its acts by the Supreme Court. It has, however, at times asserted itself in a hostile manner towards one or the other of its departments, but with no permanent results, as in 1801 when it attempted to abolish the federal courts, and in 1868 when it disciplined a President and incidently determined the character of the Supreme Court.

Such in brief is an outline of the attempt to apply and preserve Montesquieu's systems of checks and balances in our federal government. An observation of its application and survival elsewhere will not be out of place at this point. As already stated, the French constitution of 1791 was drafted in strict accord with Montesquieu's doctrine. The constitution of 1799, under which Napoleon secured for himself the office of first consul, stipulated that the first step in the enactment of laws shall be their initiation by the administration. The adoption of that constitution indicates the disappearance of the doctrine from federal forms of government. The establishment of the French Republic presents additional evidence of the rejection of the doctrine by the French people in the provisions of their Constitution of 1875, whereby the executive and legislative powers are definitely connected and express power is given to the President to initiate laws.

A brief inspection of the British government, the "mirror" in which Montesquieu saw his theory most nearly realized, indicates no reversion to the royal veto abandoned in the beginning of the eighteenth century, but rather the development of a much closer relation between the executive and the legislative departments through the ministry, with the gradual reduction of the opposition presented by the House of Lords. Nor has there been any tendency to apply the principle which Montesquieu saw so nearly perfected in the home government, in the establishment of governments in outlying dominions. The governments of Canada, Australia, and South Africa are all characterized as responsible governments. A close relation between the executive and legislative is

expressly provided in their systems of government. In Canada all executive acts are done on the advice of the cabinet, the members of which hold office only so long as they retain the confidence of the people as expressed by their representatives in parliament. In Australia the executive power, vested in the King, is exercisable by the Governor General, who is assisted by an Executive Council of responsible Ministers of State. These ministers are, or must become within three months, members of the Federal Parliament. The government of South Africa is of practically the same character as that of Canada and Australia. The Governor General holds office during the King's pleasure. He is advised by an Executive Council, whose members he nominates. Every minister of state thus appointed may sit and speak in either house, but can vote only in the house of which he is a member; but ministers cannot hold office for a longer period than three months unless they are or become members of either House of Parliament by regular election. In fact the writers on the British Government now scarcely recognize the theory. Hallam in his famous work, *Constitutional History of England*, published in 1827, did not refer to a check and balance system as even existing, but treated the English Constitution as being based on the connection of powers. Bagehot in a later work, *The English Constitution*, devotes a chapter to "Its Supposed Checks and Balances." Lack of support of the doctrine both as a theory and in practice, is clearly indicated by constitutional developments of the 19th century in France and the British Empire. An inspection of the governments of South America, which were patterned to a large degree on that of the United States, reveals in several instances an unmistakable tendency, as a result of revolutions and consequent constitutional revisions, to adopt the present French system.

In considering the check and balance system in the government of the United States, at an earlier point reference was made to the almost ever present friction and at times violent clashes between the several departments. More effective, however, in changing the character of our government has been the pressure brought to bear indirectly upon the three departments, which has tended to mold them in its subtle manner into a purposeful and harmoniously functioning government. Gradually in the actual working of the government, the separation of departments as a principle has been

discounted in favor of the fulfillment of the wish of the people. Efforts to amend the Constitution so as to have it contain a definite statement of the doctrine of the separation of powers, in accordance with which the three departments were established, ended with the first Congress. The first check to disappear without amending the Constitution was the choosing of the President by electors, and we may safely say that it is but the forerunner of the direct primary. The conflict over the slavery question ended with the overthrow of the logical structure built on the Constitution by Calhoun and the rise of the national idea worked out opportunely and presented by Webster, which in its later acceptance and application by Lincoln dealt a fatal blow to the chaotic possibilities of "State Rights" and secession. Another factor, and one that has had a tendency to reduce the barriers separating the different departments, in a more consistent and continuous manner than any other, is the political party. With the party eventually came organization and leadership and a definite governmental program. The logical leader of the party in office is the President. To him we now look for the carrying out of the preëlection promises of the party. Gradually, although in some cases reluctantly, he has been advancing to a position where he actually dominates the legislative activities of Congress. President Lincoln, in his earnest advocacy of compensated emancipation, presented, for the first time by a chief executive, a draft of a bill in connection with a message in recommending a solution of the slavery problem. Drafts of bills and joint resolutions were presented with messages to Congress by Johnson, Grant, Hayes, Arthur, Cleveland and Harrison. President Taft adopted the plan of informing Congress in his special messages that, at his request, the head of one of the departments had prepared a bill providing for the special thing to which he referred in his message, and that such bill was at the disposal of the appropriate committee of Congress, if they choose to avail themselves of it. The committees in these instances promptly asked for the bill and discussed it. President Wilson has openly assisted in preparing a legislative program with the party leaders in the Senate and House, and has insisted that certain measures be passed.

A more radical reaction against the check and balance system is seen in the recent adoption of the commission form of government for our cities. The lack of responsiveness and definite responsi-

bility in the old system, together with its inefficient administration of the people's affairs, caused it to give way under the pressure of definite problems to a system of responsible government. Evidences of similar changes in the state governments are not so apparent. A strong executive has in several instances, however, succeeded in having the wish of the people carried out by overcoming the inaction of the legislature.

When we come to inquire why the check and balance system is losing its grip on our government, our only answer seems to come after an observation of the change in conditions economic and social during the past century. In a new country with room for expansion, a government guaranteeing security to the property of the individual and at the same time sufficiently well adjusted as to run without constant watching, was quite satisfactory to the majority of the people. Appeals to the people and popular programs were not wanting, however. Advocates of democracy as a principle have been present throughout the period and have done much to promote the cause of the people in the name of democracy, but it was only when industrialism and big business attempted to securely entrench themselves behind the guarantees to minorities that the less favored majority began to turn to their government for assistance. The indirect method of electing senators was attacked with resistless vigor, and means were devised for popular selection prior to the amendment of the constitution to that effect, in order that the people might make their influence more directly felt in Congress. The executive as more nearly representing all the people than any other department, was looked to as the leader of the majority. President Roosevelt assumed this leadership with vigor. President Taft, on the other hand, due no doubt to his deep respect for judicial precedents, reluctantly took up the task, and only after he found that Congress had done practically nothing toward redeeming party pledges by legislative enactments. President Wilson upon his inauguration openly and confidently assumed the responsibilities of the leader of his party, and set about his task, to the general satisfaction of the people, by calling a special session and casting precedent aside in appearing in person before the assembled houses to read his message.

Frequent proposals have been made both in and out of Congress to the effect that heads of our executive departments be ad-

mitted to either House of Congress, whenever measures relating to their own department are under consideration. The obvious intent of those advocating this change in the relation of the departments of the government is to make possible a more harmonious administrative policy. A greater departure from the present system of separate executive and legislative authority is that contained in the proposals permitting members of either house to occupy cabinet positions. While members of the cabinet could without doubt be permitted to sit in Congress and take part in debates without amending the Constitution, a member of either house could not occupy a cabinet position because of constitutional limitations. A closer alliance between the cabinet and Congress would undoubtedly secure greater harmony in the conduct of public business by making possible a definite party plan of action. A proposed amendment to the Constitution made by Senator Bristow of Kansas on December 4, 1912, if adopted would have extended the President's power over legislation to a marked degree, by providing that he might submit to the electors at a regular Congressional election measures recommended by him which Congress had failed to enact within six months. In case such measure should receive a majority vote in a majority of the Congressional districts and also in a majority of the States, it should become a law. This referendum if adopted would no doubt rarely be used, but would secure the end sought by keeping Congress awake to the call of public opinion as developed under the leadership of a strong executive.

Opposition to this increase of power on the part of the President is not wanting. There are those who rise in one or the other houses of Congress and denounce it as only becoming to a czar, and as directly opposing the principle of checks and balances in accordance with which our government was framed. Arguments of this kind in recent years are not taken seriously in either body. That there are far reaching advantages in the modification of the system to the extent already observed, seems to be generally accepted. It means a prompter and more efficient expression of public opinion as well as a better placing of responsibility. It will without doubt mean more sincere party platforms. As to the danger in increasing the President's power, the real increase of power accrues to the people, for by its exercise they are able to render far more effective their support of desirable measures.